

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

FEBRUARY 18, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1383

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

GARY TIMM and KANDIS TIMM,

Plaintiffs-Respondents,

v.

**JOHN ROBEY, D/B/A K & R FARM
SERVICE, RURAL MUTUAL INSURANCE
COMPANY AND DYNAMATIC FEEDING
SYSTEMS, INC.,**

Defendants,

**WHISPERING SILOS, INC. AND RURAL
MUTUAL INSURANCE COMPANY,**

Defendants-Third-Party Plaintiffs,

v.

**UNISYS MEDICAL PLAN, A/K/A UNISYS
BENEFIT PAYMENT OFFICE,**

Third-Party Defendant-Appellant.

APPEAL from a judgment of the circuit court for St. Croix County:
C.A. RICHARDS, Judge. *Modified and, as modified, affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Unisys Medical Plan, joined as a third-party defendant pursuant to § 803.03(2), STATS., arising from its payment of medical expenses to plaintiffs Gary and Kandis Timm, appeals a default judgment granted when it failed to answer. The underlying action in this case was a personal injury action by the Timms against various defendants, which was ultimately settled. The default judgment dismissing Unisys as a party provides that Unisys is "foreclosed from all right or interest in, or lien upon, the settlement proceeds paid to plaintiffs" by the defendants in the underlying action. Unisys obtained a separate money judgment in federal court against the Timms based upon a provision in the ERISA health insurance plan. The federal court ruled that it had jurisdiction over Unisys' claim for reimbursement because the benefits paid to the Timms were pursuant to a federally controlled ERISA (Employee Retirement Income Security Act) plan. The district court rejected application of the doctrines of issue preclusion and claims preclusion, ruling that any reimbursement dispute between the Timms and Unisys was neither raised by adversary pleadings in the state court nor actually litigated in light of the default judgment.

Unisys challenges the default judgment on several grounds: (1) it was based upon the Timms' motion even though it was the defendants and not the Timms who joined Unisys as a party; (2) the judgment grants relief beyond that sought in the third-party complaint; and (3) the judgment is inconsistent with Unisys' money judgment obtained in federal court.

We conclude that the circuit court had the discretion to grant a default judgment against Unisys for failure to answer. However, we conclude that the language of the judgment granting a dismissal exceeds the relief sought in the third-party complaint. We therefore modify the judgment to provide only that the third-party complaint is dismissed. In light of our decision to modify the state court judgment, we need not address the effect of any conflict between the judgment of dismissal and the judgment granted in federal court. The judgment of dismissal, as modified, is affirmed.

The Timms brought this personal injury action in 1993, arising from a farm accident in 1991. Two of the principal defendants joined Unisys as

a third-party defendant. This third-party complaint alleged only that Unisys was added as a third party, pursuant to § 803.03(2), STATS.,¹ "as a result of their claim for subrogation for payments made on behalf of Gary Timm." The third-party summons and complaint was served upon Unisys in November 1994. Unisys failed to file an answer within the twenty-day statutory time provided. In February 1995 the Timms filed a motion seeking dismissal of Unisys' subrogation claim, while Unisys moved the court for leave to file its answer and cross-claim. The court took the motion under advisement and, following the settlement of the underlying claim, granted the Timms' motion dismissing the third-party complaint.

In the meantime, while the motion to dismiss was pending, Unisys filed an action in the United States District Court for the Western District of Wisconsin seeking reimbursement, citing federal jurisdiction over ERISA claims. After the default judgment in state court, the federal court granted Unisys a money judgment for the \$55,484.45 it had paid toward Timm's medical expenses. The federal court ruled that any state judgment would have no preclusive effect because the doctrines of claims preclusion and issue preclusion were inapplicable, citing the comments to the RESTATEMENT (SECOND) OF JUDGMENTS §§ 24 through 38.

Unisys first contends that because the Timms pled no claim against it, they were was not entitled to seek default judgment.² We discover no merit in this contention. First, Wisconsin pleading and practice contemplates

¹ Section 803.03, STATS., provides in part:

(2) Claims arising by subrogation, derivation and assignment. (a) *Joinder of related claims.* A party asserting a claim for affirmative relief shall join as parties to the action all persons who at the commencement of the action have claims based upon subrogation to the rights of the party asserting the principal claim, derivation from the principal claim, or assignment of part of the principal claim.

² In the trial court, Unisys argued that it had a courtesy agreement with the principal defendants' attorneys that no answer was necessary. The circuit court rejected that argument because the agreement was not made until after the time to answer had expired, and because the agreement was not in writing and signed by the party to be bound. Unisys does not rely upon the agreement as a grounds for reversal on appeal.

that an insurer who may have a claim of subrogation, a derivative claim or an assignment be joined. Section 803.03(2), STATS. The fact that this statute contemplates the joinder be made by the party seeking affirmative relief, in this case the plaintiff, is no bar to joinder. Section 803.06(1), STATS., provides that "[p]arties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action and on such terms as are just." Once joined, third-party practice is governed by § 803.05, STATS. This statute expressly contemplates that the party served with a third-party summons and complaint shall make defenses, counterclaims and cross-claims as provided by the relevant pleading statutes, §§ 802.06 and 802.07, STATS. The default judgment was properly granted.

The default judgment, however, purports to bar Unisys from sharing in the proceeds of plaintiffs' settlement with the principal defendants. Section 806.01(1)(c), STATS., relating to default judgment provides: "If there be no answer the relief granted to the plaintiff shall not exceed that demanded in the complaint."

The third-party complaint did not seek to foreclose Unisys from all rights or interest in, or lien upon, the settlement proceeds paid to plaintiff. We therefore conclude that the language of the judgment is in violation of § 806.01(1)(c), STATS., controlling default judgments. The judgment is modified to provide only that the third-party complaint joining Unisys is dismissed.

Because we conclude that the default judgment merely precludes the determination of Unisys' claim, we need not resolve the alleged conflict between the federal judgment and the dismissal in federal court. The validity of the federal judgment is not before us on appeal.

By the Court.—Judgment modified and, as modified, affirmed.

Not recommended for publication in the official reports.